Abdul Manaf bin Ahmad v Mohd Kamil Datuk Haji Mohd Kassim

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02–1052 OF 2004

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GOPAL SRI RAM, RAUS SHARIF AND ABU SAMAH JJCA
26 NOVEMBER 2008

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Limitation — Postponement of limitation period — Fraudulent concealment — Respondent lodged police report against appellant for criminal breach of trust — Public prosecutor decided not to act on complaint — Appellant sued respondent for defamation and malicious falsehood — Whether action time-barred — Whether limitation period postponed due to fraudulent concealment by respondent — Whether fraud pleaded — Interpretation of s 18 of the Sabah Limitation Ordinance (Cap 72)

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The appellant and the respondent were members of the Tawau Native Timber Co-operative Society ('society'), the affairs of which were managed by an administration committee. In 1985, when the appellant was the society's honorary treasurer and the respondent a member of the committee, a disagreement arose between them about the management of the business and affairs of the society. This led to the respondent lodging a police report in July 1987 alleging the appellant had embezzled RM200,000 from the society's coffers. The appellant was arrested the same day but was later released. Five years later, in 1992, he was again arrested and then released. Police later informed him the case had been closed. In October 2000 the public prosecutor wrote to say he had decided not to act upon the complaint. In March 2001, the appellant sued the respondent in the High Court claiming damages for defamation and malicious falsehood. The defence raised, inter alia, limitation which found favour with the trial judge who dismissed the action. The appellant appealed the decision to the Court of Appeal. The only issue for determination was whether the appellant's claim was time-barred. Pursuant to items 11 and 20 of the Schedule to the Sabah Limitation Ordinance (Cap 72) ('the Ordinance') the appellant's claims for, respectively, libel and malicious falsehood were time-barred. The appellant, however, said time had not run against him because of the existence of fraud as provided for in s 18 of the Ordinance. It was alleged the respondent had fraudulently concealed the fact he had lodged a police report containing material defamatory of the appellant. As the latter was unaware of the facts that gave rise to his cause of action he was unable to bring an action within the time limited by items 11 and 20 of the Ordinance.

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Held, dismissing the appeal with costs and affirming the orders of the High Court:

(1) The appellant's pleaded case did not raise a charge of fraud at all to bring it within the purview of s 18 of the Ordinance. It was a cardinal rule of pleadings now housed in O 18 r 12 of the Rules of the High Court 1980 that a plea of fraud must be expressly taken with full particulars so that a court would not permit a litigant to raise or argue an unpleaded or unparticularised charge of fraud (see para 11).

(2) The appellant's argument that he was unaware of the identity of the person who had defamed him and that he could not therefore institute proceedings within the limitation period was without merit (see para 10).

(3) Upon his arrest he could have applied for and obtained from the police a copy of the first information report from which he could have ascertained who had libelled him. He did not act with reasonable diligence to ascertain the respondent's identity within the prescribed limitation period. Absent fraud on the part of the defendant, it was no answer to a plea of limitation for a plaintiff to say he was unaware he had a cause of action during the relevant period prescribed by the statute (see para 10).

(4) There was no affirmative act on the respondent's part designed to prevent the appellant from discovering his right of action or to deceive or lull the appellant from making inquiries into the facts relevant to his right to bring an action for libel. The respondent merely remained silent about the fact he had lodged a police report and that, on the authorities, did not amount to fraudulent concealment (see para 9).

[Bahasa Malaysia summary

Perayu dan responden adalah ahli-ahli Persatuan Koperasi Kayu balak Penduduk Asal Tawau ('persatuan'), yang mana hal ehwalnya diuruskan oleh ahli jawatankuasa pentadbiran. Pada 1985, semasa perayu adalah bendahari kehormat persatuan dan responden ahli jawatankuasa, percanggahan berbangkit di antara mereka mengenai pengurusan perniagaan dan hal ehwal persatuan. Ini membawa kepada responden membuat laporan polis pada Julai 1987 mendakwa perayu telah menggelapkan wang sebanyak RM200,000 daripada tabung persatuan. Perayu ditangkap pada hari yang sama tetapi dilepaskan kemudiannya. Lima tahun kemudian, pada 1992, dia sekali lagi ditangkap dan dilepaskan. Polis kemudiannya memberitahu dia yang kes tersebut telah ditutup. Pada Oktober pihak pendakwa menulis untuk menyatakan yang dia memutuskan untuk tidak bertindak atas aduan tersebut. Pada Mac 2001, perayu menyaman responden di Mahkamah Tinggi, menuntut Ganti rugi untuk fitnah dan kepalsuan niat jahat. Pembelaan membangkitkan, antara lain, had masa yang memihak hakim bicara yang menolak yindakan tersebut. Perayu merayu keputusan tersebut kepada Mahkamah Rayuan. Satu-satunya isu untuk penentuan adalah sama ada

tuntutan perayu adalah dihalang masa. Berikutan perkara 11 dan 20 Jadual kepada Ordinan Had Masa Sabah (Cap 72) ('Ordinan') tuntutan perayu untuk fitnah dan kepalsuan niat jahat adalah masing-masing dihalang masa. Walau bagaimanapun perayu menyatakan masa tidak menghalang dia kerana, kewujudan fraud seperti yang diperuntukkan di dalam s 18 Ordinan. Ia didakwa bahawa responden telah secara fraud menyembunyikan fakta yang dia membuat laporan polis yang mengandungi material fitnah terhadap perayu. Memandangkan perayu tidak mengetahui fakta yang membangkitkan kausa tindakannya dia tidak boleh membangkitkan tindakan dalam masa yang dihadkan oleh perkara 11 dan 20 Ordinan.

Diputuskan, menolak rayuan dengan kos dan mengesahkan perintah-perintah Mahkamah Tinggi:

(1) Kes rayuan perayu langsung tidak membangkitkan tuduhan fraud untuk membangkitkan ia dalam skop s 18 Ordinan. Ia adalah peraturan utama pliding yang sekarang ini terletak di dalam A 18 k 12 Kaedah-Kaedah Mahkamah Tinggi 1980 bahawa rayuan fraud mesti diambil secara nyata dengan butir-butir kesemuanya dengan itu mahkamah tidak akan membenarkan litigan untuk membangkitkan atau berhujah tuduhan fraud yang tidak diplidkan atau tidak disenaraikan (lihat perenggan 11).

(2) Hujahan perayu bahawa dia tidak mengetahui identiti orang yang memfitnahkan dia dan bahawa oleh itu dia tidak dapat memulakan prosiding dalam tempoh had masa adalah tanpa merit (lihat perenggan 10).

(3) Semasa penangkapannya perayu sepatutnya memohon dan memperolehi daripada polis salinan laporan maklumat pertama daripada mana dia boleh memastikan siapa yang memfitnah dia. Dia tidak bertindak dengan ketekunan munasabah untuk memastikan identiti responden dalam masa tempoh had masa yang dinyatakan. Ketiadaan fraud oleh pihak defendan, ia bukan jawapan kepada rayuan had masa untuk plaintif menyatakan dia tidak mengetahui yang dia mempunyai kausa tindakan semasa tempoh relevan yang dinyatakan oleh statut (lihat perenggan 10).

(4) Tidak terdapat tindakan yang mengiakan oleh pihak responden yang tujuannya untuk menghalang perayu daripada menyedari hak tindakannya atau untuk memperdaya atau melalaikan perayu daripada membuat pertanyaan mengenai fakta relevan terhadap haknya untuk membangkitkan tindakan untuk fitnah. Responden hanya kekal berdiam diri mengenai fakta yang dia telah membuat laporan polis dan bahawa, atas autoriti-autoriti, tidak menyebabkan kepada penyembunyian fraud (lihat perenggan 9).]

Notes

For cases on fraudulent concealment, see 9 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2371-2372.

Cases referred to

Ardikappa v Kadappa (1916) 36 IC 418 (folld)
Bapalal & Co v V Krishnaswami Iyer AIR 1941 Mad 26 (folld)
Gunga Narain Gupta v Tiluckram Chowdhry LR 15 IA 119 (refd)
Haji Mohamed Dom v Sakiman [1956] MLJ 45, CA (refd)
Hoe Thean Sun & Anor v Lim Tee Keng [1999] 3 MLJ 138, HC (distd)
Kitchen v Royal Air Forces Association & Ors [1958] 2 All ER 241, CA (refd)
Lalta Singh v Muthur Upadhia ILR 6 Luck 374 (folld)
Lim Yoke Kong v Sivapiran a/l Sabapathy [1992] 2 MLJ 571, SC (refd)
Martin Rhienus v Sher Singh [1949] MLJ 201, CA (refd)
Stallworthy v Geddis (1909) 28 NZLR 366 (refd)
Ting Ling Kiew & Anor v Tang Eng Iron Works Co Ltd [1992] 2 MLJ 217, SC (refd)

Legislation referred to

Criminal Procedure Code ss 107, 112
Indian Limitation Act 1908
Indian Limitation Act 1963 s 17
Limitation Act 1953
Rules of the High Court 1980 O 18 r 12
Sabah Limitation Ordinance (Cap 72) s 18

Appeal From: Suit No T(22) of 2001 (High Court, Tawau).

Saiful Azian bin Mokhtar (V K Liew & Partners) for the appellant.
Mirdin Mamdin (Chin Mirdin & Co) for the respondent.

Gopal Sri Ram JCA:

[1] This is an interesting case. It has to do with the interpretation to be given to s 18 of the Sabah Limitation Ordinance (Cap 72) in the context of an action for defamation and malicious falsehood. But first the facts.

[2] The plaintiff and defendant are members of the Tawau Native Timber Co-operative Society ('the society'). The affairs of the society were managed by an administration committee called the Lembaga Jawatankuasa Pentadbir. In 1985, when the plaintiff was the society's honorary treasurer and the defendant a member of the committee in question there was disagreement between them about the management of the business and affairs of the society. This led to the defendant lodging a police report against the plaintiff alleging criminal breach of trust. The report was lodged on 29 July 1987. Investigations commenced

and the plaintiff was arrested on the same day. However, he was later released. Some five years later, in 1992, he was arrested again. Once again he was released. A few months later, he was informed by the police that the case against him had been closed. On 13 October 2000 the Public Prosecutor wrote to say that he had decided not to act upon the complaint. On 23 March 2001, the plaintiff issued writ and claimed damages for defamation and malicious falsehood. The defendant raised several defences including limitation. The learned judge who tried the case acceded to the limitation defence and dismissed the action. The plaintiff has now appealed to us.

[3] When this appeal was called on, the attention of counsel on both sides was drawn to the decision of the Court of Appeal of the Federated Malay States in *Martin Rhienus v Sher Singh* [1949] MLJ 201, where it was held that a statement made by a person to a police officer in the course of police investigation is absolutely privileged. In the course of his judgment, Willan CJ referred, without any criticism, to the observation of the trial judge in that case as follows:

> He [the trial judge] held, however, that the statement was absolutely privileged, and, after citing several Indian cases, decided 'that no distinction can be drawn between the privilege which must be accorded to an information given to a police officer under s 107 of the Criminal Procedure Code and to a statement recorded by a police officer under s 112'.

[4] It is implicit from *Martin Rhienus v Sher Singh* that both statements made in first information reports under s 107 of the Criminal Procedure Code and in police statements made under s 112 thereof are absolutely privileged for the purpose of the law of defamation. I consider this to be good law. And I find support for the view I take of the matter from the decision of several Indian cases including *Bapalal & Co v V Krishnaswami Iyer* AIR 1941 Mad 26. That was a case in which a letter of complaint to the police by the defendant alleging that the plaintiff had committed a crime was held to be absolutely privileged and therefore not actionable. By reason of what I have said thus far, I am unable to agree with the view expressed in *Hoe Thean Sun & Anor v Lim Tee Keng* [1999] 3 MLJ 138, that a defamatory statement in a police report is only protected by the defence of qualified privilege. It is apparent from the report of that case that the decision in *Martin Rhienus v Sher Singh* was not brought to the attention of the High Court. There is no doubt that defamatory statements in police reports must attract the defence of absolute privilege for reasons of public policy. If actions can be brought against complainants who lodge police reports, then it would discourage the reporting of crimes to the police thereby placing the detection and punishment of crime at serious risk. The criminal law readily provides for a remedy against persons who make false police reports.

[5] Learned counsel's response to the privilege point is that it was not taken by the defendant in its defence in the instant case. He argued that it was a matter for the defendant to plead the defence and that it was not open for this court to dismiss his client's appeal on an unpleaded defence. In my judgment the point is well taken. It is settled that a court is duty bound to decide a case only on the points raised in the pleadings. See, *Haji Mohamed Dom v Sakiman* [1956] MLJ 45. It is equally settled that in an action for defamation not only must the defence of privilege be specially pleaded, but the facts and circumstances must also be stated showing how and why the occasion is privileged. See, *Stallworthy v Geddis* (1909) 28 NZLR 366. Accordingly the only issue left for us to decide is whether the plaintiff's claim is barred by limitation.

[6] Here, the starting point is, of course, the Ordinance itself. It is based upon — indeed it is constructed in the same fashion as — the Indian Limitation Act 1908. In respect of libel, the relevant entry in the schedule to the Ordinance is Item 11 which prescribes a limit of one year to bring an action for compensation for libel, with the time commencing from the date on which the libel was published. As for the claim for malicious falsehood, this is covered by Item 20 which refers to suits for 'compensation for any malfeasance, misfeasance or nonfeasance independent of contract and not herein specially provided for' and prescribes a time limit of one year from the date 'when the malfeasance, misfeasance or nonfeasance takes place'. It is common ground before us that if you apply either of these time limits, the plaintiff was clearly well beyond the limitation prescribed by the Ordinance.

[7] Learned counsel for the plaintiff has however argued that the foregoing items of limitation do not apply to his client by reason of s 18 of the Ordinance. The section reads:

> 18 When any person having a right to institute a suit has by means of fraud been kept from the knowledge of such right or of the title on which it is founded, or where any document necessary to establish such right has been fraudulently concealed from him, the time limited for instituting a suit—
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> (a) against the person guilty of the fraud or accessory thereto; or
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> (b) against any person claiming through him otherwise than in good faith and for a valuable consideration,
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> shall be computed from the time when the fraud first became known to the person injuriously affected thereby or, in the case of the concealed document, when he first had the means of producing it or compelling its production.

The argument here is that the defendant fraudulently concealed the fact that he had lodged a police report containing material defamatory of the plaintiff. Reliance is placed on the fact that there was an annual general meeting of the Society on 23 August 1987 at which the defendant made no mention of the fact

that he had lodged the report on 29 July 1987 alleging that the plaintiff had embezzled RM 200,000 from the Society's coffers. Accordingly, the plaintiff was unaware of the facts that gave rise to his cause of action and hence could not bring an action within the time limited by Items 11 and 20 of the Ordinance.

[8] Now, what the section requires is that the defendant should have fraudulently kept from the plaintiff the knowledge of the latter's right to bring an action. In short there must been fraudulent suppression or concealment of material facts going to the plaintiff's right of action. In *Lim Yoke Kong v Sivapiran a/l Sabapathy* [1992] 2 MLJ 571, the Supreme Court held that the expression 'fraud' appearing in the not dissimilarly constructed s 29 of the Limitation Act 1953 included equitable fraud, that is to say, unconscionable conduct on the part of the defendant. In arriving at this conclusion Mohamed Azmi SCJ who delivered the judgment of the court agreed with and adopted the following view expressed by Lord Evershed MR in *Kitchen v Royal Air Forces Association & Ors* [1958] 2 All ER 241:

> It is now clear, however, that the word 'fraud' in s 26(b) of the Limitation Act 1939, is by no means limited to common law fraud or deceit. Equally, it is clear, having regard to the decision in *Beaman v ARTS Ltd* [1949] 1 All ER 465, that no degree of moral turpitude is necessary to establish fraud within the section. What is covered by equitable fraud is a matter which Lord Hardwicke did not attempt to define two hundred years ago, and I certainly shall not attempt to do so now, but it is, I think, clear that the phrase covers conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other.

[9] Rustomji on *The Law of Limitation and Adverse Possession* (7th Ed) a leading work on the subject, has this comment to make (at p 306 of the text) on the Indian equipollent of s 18 (viz, s 17 of the Limitation Act 1963):

> There must be some affirmative act designed to prevent, and which does prevent, the discovery of the cause of action. Mere silence or passiveness (there being no fiduciary relation or act of the party calculated to deceive or lull inquiries) is not fraudulent concealment.

If you apply that to the present case, you will see that there was no affirmative act on the part of the defendant designed to prevent the discovery of the right of action. The defendant merely remained silent at the general meeting. On the authorities this is insufficient. In the first place the parties do not stand in a fiduciary position to each other. In the second place, there was no act on the part of the defendant to deceive or lull the plaintiff into making inquiries into the facts relevant to his right to bring an action for libel.

[10] The plaintiff's argument that he was unaware of the identity of the person who had defamed him and could not therefore institute proceedings

within the limitation period is equally without merit. Upon his arrest he could have applied for and obtained from the police a copy of the first information report in the case. From it he could have quite readily ascertained that it was the defendant who had libelled him. The instant plaintiff did not therefore act with reasonable diligence in ascertaining the defendant's identity within the prescribed limitation period. It may be added that, absent fraud on the part of the defendant, it is no answer to a plea of limitation for a plaintiff to say that he was unaware that he had a cause of action during the relevant period prescribed by the statute. See *Ardikappa v Kadappa* (1916) 36 IC 418; *Lalta Singh v Muthur Upadhia* ILR 6 Luck 374. That principle, in my judgment, applies with full force to the facts of the present instance.

[11] Quite apart from what I have said thus far, the plaintiff ought not, in my view, be permitted to rely on s 18 by reason of the way he has fashioned his pleaded case. It is a cardinal rule of pleadings now housed in RHC O 18 r 12, that a plea of fraud must be expressly taken with full particulars so that a court will not permit a litigant to raise or argue upon an unpleaded or unparticularised charge of fraud. See *Gunga Narain Gupta v Tiluckram Chowdhry* LR 15 IA 119; *Ting Ling Kiew & Anor v Tang Eng Iron Works Co Ltd* [1992] 2 MLJ 217. In the present instance, the plaintiff's pleaded case does not raise a charge of fraud at all to bring himself within the purview of s 18 of the Ordinance. Accordingly, it is a point that is not fairly open to him to raise before us.

[12] For the reasons already given, it is my considered judgment that the learned judge was correct in dismissing the plaintiff's action as being barred by limitation. I would therefore dismiss the appeal. The plaintiff must pay the costs of this appeal to the defendant. The deposit in court shall be paid out to the defendant to account of his taxed costs. The orders of the High Court are affirmed.

[13] My learned brothers Raus Sharif and Abu Samah bin Nordin, JJCA have seen this judgment in draft and have expressed their agreement with it.

Appeal dismissed with costs and orders of the High Court affirmed.

Reported by Ashok Kumar